Top-A Plastics Sdn Bhd & Ors v Bumiputra Commerce Bank Bhd (fromerly known as Bank of Commerce (M) Bhd)

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–1449 OF 2000
RAMLY ALI J
3 MAY 2006

Banking — Banker and customer — Contractual relationship — Dishonouring plaintiff's cheque — Freezing of account after bank received two garnishee orders — Failure to inform — Whether bank failed in it's duty to act promptly as a banker to the plaintiff

Banking — Banks and banking business — Current account — Garnishee orders and its effect — 'Limited' or 'unlimited' order — Duty of bank

Banking — Banks and banking business — Defamation — 'FROZEN ACCOUNT' printed on cheques — Whether defamatory

Banking — Cheques — Current account — Freezing of account after bank received two garnishee orders — Failure to inform — Subsequent deposit of cash into account — Cheques dishonoured — 'FROZEN ACCOUNT' printed on cheques — Whether libellous — Damages — Principles applied in assessing damages

Tort — Defamation — Libel — Dishonour of cheques — 'FROZEN ACCOUNT' printed on cheques — Words were libellous — Damages — Principles applied

The first plaintiff was a customer of the defendant bank. The defendant received two garnishee orders to show cause on 15 October 1999, and thereafter the defendant had frozen all the plaintiff's accounts from 15 October 1996 to 22 October 1999 for eight days (or seven banking days), without informing the plaintiff by written notice nor verbally, nor by telephone, nor by facsimile nor by any other means. The plaintiff only came to know about the frozen account when, on 18 October 1999 one of its employees had phoned the plaintiff complaining that two cheques issued by the plaintiff for payment were rejected by the defendant upon presentation. On 15 October 1999, after the plaintiff's current account had been frozen by the defendant, there was a sum of RM98,888.06 directly paid into the already frozen current account of the plaintiff from USA by telegraph transfer. This sum was never been allowed to be utilised by the plaintiff eventhough it was deposited after the plaintiff's current account had been frozen. At the material times from 15 October 1999 to 22 October 1999 the total sum frozen by the defendant was RM443.619.54

(including the aforesaid sum of RM98,888.06). If added together with the fixed deposit account sum of RM211,469.17, the total sum is RM655,088.66. During the same period (15 October 1999 to 22 October 1999), out of the cheques issued by the plaintiff and paid in by the relevant parties for payment, there were 12 cheques dishonoured by the defendant and printed the word 'FROZEN ACCOUNT' and two cheques had been printed with the word 'REFER TO DRAWER'. The plaintiff's claim for account wrongly frozen by the defendant; the defendant wrongly dishonouring the cheques presented for payment and the defendant had wrongly and/or maliciously printed the word 'Frozen Account' on the said cheques. The main issue to be determined here was — what was the extent of the defendant's obligation (as a garnishee) under the said garnishee orders. Was it the defendant's obligation to attach 'any debt due or accruing due to the judgment debtor (plaintiff) from the garnishee (defendant)' even though the amount of the judgment debt was less than the balance standing to the plaintiff's credit in the accounts; or does the garnishee order only confined to the amount 'so much thereof as is sufficient to satisfy the judgment debt or others and the costs of the garnishee proceedings'.

Held:

(1) The court has to see the wordings and effect of the said garnishee orders — whether they are of 'unlimited' nature or 'limited' nature. The court is satisfied that both the garnishee orders in the present case from their respective wordings and terms, are 'limited' in nature, with the principal debts, interests and costs had been clearly specified and spelt out in the orders (see paras 18, 25).

(2) As a prudent banker, the defendant should have notified the plaintiff immediately of the matter upon service of the garnishee orders on 15 October 1999, not to wait until 22 October 1999. The plaintiff should be informed that, it he wishes to do so, he may open a new account for future transaction. Alternatively, the defendant should have set aside the total amount required to satisfy the garnishee orders in full into a suspense account and allow the plaintiff to continue operating the existing accounts. Both has not been done by the defendant in this case. The court is satisfied that the defendant has failed in it's duty to act promptly as a banker to the plaintiff, as it's customer (see paras 28, 29).

(3) In the present case, the defendant has wrongly frozen the said amount of RM98,888.06 which was paid in after the garnishee orders were served on the defendant and the current account of the plaintiff frozen by the defendant. The said amount is not subject to the garnishee orders and should be paid into a new temporary account so that the plaintiff has the benefit to utilise the amount. This was also not done by the defendant (see para 34).

(4) By printing the words 'FROZEN ACCOUNT' and 'REFER TO DRAWER', it is actually highly libellous, and tantamount to mean that the plaintiff had been wound up or had gone into liquidation. It is more severe than words 'Account Closed'. The defendant had published this defamatory words to the holder of the cheques, the banks which were clearing the cheques (see para 35).

(5) The credit rating of the plaintiff (who is actively engaged in trade) is as important for their trade transactions including mortgages and hire-purchase as well as banking and credit facilities. The refusal to meet the plaintiffs cheques is so obviously injurious to the plaintiffs credit and that the plaintiff should recover, substantial, but reasonable compensation for the injury done too it's credit ((see para 46); *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119.

(6) Damages should be awarded to the plaintiff by the defendant for wrongfully dishonoured the cheques of the plaintiff drawn upon the defendant where there was more than sufficient funds in the plaintiff's accounts. The damages should be substantial and not nominal and the plaintiff need not even plead or prove damages. The defendant was not in breach of the contract for wrongfully dishonouring the plaintiff's cheque for once but repeatedly for 14 times (see para 48).

(7) The general rule is that damages are to be assessed on a compensatory basis i.e. to compensate the plaintiff for the harm caused to him by those libelous words. The compensation may be inflated by certain aggravating factors such as the defendant's nature, conduct, malice etc; trade operation of the plaintiff, customers' and suppliers' estimation of the plaintiff's credit integrity; and the locality where the plaintiff operates its business (see paragraph 49).

(8) Even though the plaintiff is entitled to claim substantial damages from the defendant, the court must stress that the damages must be reasonable. In the present case, the plaintiff is asking for RM22,000,000 as general damages. This amount is far too exorbitant and excessive. After taking into consideration all the relevant factors, the court is of the view that a sum of RM1,000,0000 as general damages is reasonable under the circumstances of the present case (see para 53).

[Bahasa Malaysia summary

Plaintif pertama adalah pelanggan bank defendan. Defendan menerima dua perintah garnisan untuk tunjuk sebab pada 15 October 1999, dan seterusnya defendan telah membekukan akaun-akaun plaintiff dari 15 Oktober 1996 sehingga 22 Oktober 1999 untuk lapan hari (atau tujuh hari perbankan), tanpa memberitahu plaintiff dengan notis bertulis ataupun secara lisan, ataupun dengan talipon atau secara faks ataupun dengan cara-cara yang lain. Plaintif hanya ketahui akaunnya dibekukan pada 18 Oktober 1999 apabila salah seorang pekerjanya menalipon plaintif mengadu bahawa dua cek-cek yang dikeluarkan oleh plaintif untuk bayaran ditolak oleh defendan ketika dikemukakan. Pada 15 Oktober 1999, selepas akaun semasa plaintif dibekukan, terdapat satu jumlah RM98,888.06 yang dibayar secara terus ke dalam akaun plaintif yang telah dibekukan itu dari USA melalui pindahan telegrafi. Jumlah ini tidak dibenar untuk digunakan oleh plaintif walaupun ia didepositkan selepas akaun semasa plaintif dibekukan. Pada masa yang material dari 15 Oktober 1999 sehingga 22 Oktober 1999, jumlah amaun yang dibekukan oleh defendan ialah RM443.619.54 (termasuk jumlah RM98,888.06 tersebut). Jika dicampurkan dengan akaun simpanan tetap yang berjumlah RM211,469.17, jumlah keseluruhan ialah RM655,088.66. Pada masa yang sama (15 Oktober 1999 sehingga 22 Oktober

1999), daripada cek-cek yang dikeluarkan oleh plaintif kepada pihak-pihak yang relevan untuk pembayaran, terdapat 12 cek-cek yang tidak dikurniakan oleh defendan dan di cetak dengan perkataan 'FROZEN ACCOUNT' dan dua cek-cek dicetak dengan perkataan 'REFER TO DRAWER'. Tuntutan plaintif ialah untuk akaun yang salah dibekukan oleh defendan; defendan salah dalam tidak mengurniakan cek-cek yang dikemukakan untuk bayaran dan defendan telah salah dan/atau berniat jahat mencetak perkataan 'Frozen Account' pada cek-cek tersebut. Isu utama untuk diputuskan di sini ialah — apakah tahap obligasi defendan (sebagai yang digarnis) di bawah perintah-perintah garnisan tersebut. Adakah obligasi defendan untuk menahan 'sebarang hutang yang kena dibayar atau terakru kena dibayar kepada penghutang penghakiman (plaintif) oleh garnisi (defendan)' walaupun amaun hutang penghakiman adalah kurang daripada baki jumlah kredit di dalam akaun-akaun plaintif; ataupun adakah perintah garnisan hanya melibatkan amaun 'setakat jumlah yang cukup yang dapat memuaskan penghutang penghakiman atau yang lain-lain dan kos tindakan garnisan'.

Diputuskan:

(1) Mahkamah semestinya melihat susunan kata dan kesan perintah-perintah garnisan tersebut — sama ada mereka bersifat 'tidak terhad' ataupun bersifat 'terhad'. Mahkamah berpuashati kedua-dua perintah garnisan dalam kes ini daripada susunan kata dan terma-terma mereka, adalah bersifat 'terhad', dengan hutang prinsipalnya, faedah dan kos dengan jelas dinyatakan di perintah-perintah tersebut (lihat perenggan 18, 25).

(2) Sebagai bank yang cermat, defendan sepatutnya memberitahu plaintif dengan segera akan perkara tersebut selepas sahaja disampaikan perintah-perintah garnisan pada 15 Oktober 1999, dan bukan tunggu sehingga 22 Oktober 1999. Plaintif sepatutnya diberitahu bahawa, sekiranya dia ingin, dia boleh membuka satu akaun baru untuk transaksi masa depan. Atau secara alternatif, defendan sepatutnya mengetepikan amaun jumlah yang perlu untuk memuaskan perintah-perintah garnisan tersebut sepenuhnya ke satu akaun penggantungan dan membenarkan plaintif meneruskan operasi akaun-akaunnya yang sedia ada. Kedua-dua perkara ini tidak dilakukan oleh defendan dalam kes ini. Mahkamah berpuas hati bahawa defendan telah gagal dalam kewajipannya untuk bertindak dengan segera sebagai bank yang berurusan dengan plaintif, yang merupakan pelanggannya (lihat perenggan 28, 29).

(3) Dalam kes ini, defendan telah salah dalam membekukan amaun RM98,888.06 yang dibayar selepas perintah-perintah garnisan disampaikan kepada defendan dan akaun semasa plaintif dibekukan oleh defendan. Amaun tersebut tidak ditaklukkan kepada perintah-perintah garnisan dan sepatutnya dibayar ke satu akaun sementara yang baru supaya plaintif dapat menggunakan amaun tersebut. Ini tidak dilakukan oleh defendan (lihat perenggan 34).

(4) Dengan mencetak perkataan-perkataan 'FROZEN ACCOUNT' dan 'REFER TO DRAWER', is sebenarnya tersangat berunsur libel, dan sama seperti plaintif telah digulungkan atau telah melalui proses likuidasi. Ia adalah lebih parah daripada perkataan-perkataan 'Account Closed'. Defendan telah

menerbitkan perkataan-perkataan fitnah ini kepada pemegang-pemegang cek-cek, bank-bank yang membayar cek-cek tersebut (lihat perenggan 35).

(5) Nilai kredit plaintif (yang aktif dalam perdagangan) adalah penting untuk transaksi dagangan mereka termasuk gadaian dan pajakan dan juga fasiliti kredit dan pembankan. Keengganan membayar cek-cek plaintif adalah begitu nyata akan menjejaskan kredit plaintif dan plaintif sepatutnya mendapat balik ganti rugi yang substantif tetapi berpatutan untuk kerosakan kepada kreditnya ((lihat perenggan 46); *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119.

(6) Ganti rugi sepatutnya diaward kepada plaintif oleh defendan kerana keengganan mengurniakan cek-cek plaintif dengan salah yang ditunaikan oleh defendan apabila terdapat wang berlebihan dalam akaun-akaun plaintf. Ganti rugi juga sepatutnya substantif dan bukan nominal dan plaintif tidak perlu memplidkan atau membuktikan ganti rugi. Defendan bukan sahaja memungkirkan kontrak oleh kerana keengganan mengurniakan cek-cek plaintif sekali tetapi mengulanginya sebanyak 14 kali (lihat perenggan 48).

(7) Prinsip am adalah bahawa ganti rugi adalah ditaksirkan atas dasar pampasan, iaitu untuk memberi pampasan kepada plaintif untuk kerosakan kepada beliau yang disebabkan oleh perkataan- perkataan libel tersebut. Pampasan tersebut boleh dilambungkan oleh faktor-faktor tertentu yang lebih keruh seperti sifat defendan, tingkah laku, niat jahat dan lain-lain; operasi dagangan plaintif, penilaian integriti kredit plaintif oleh pelanggan-pelanggannya dan pembekal-pembekalnya; dan kawasan plaintif menjalankan perniagaannya (lihat perenggan 49).

(8) Walaupun plaintif berhak menuntut ganti rugi substantif daripada defendan, Mahkamah mesti menekan bahawa ganti rugi mestilah berpatutan. Dalam kes ini, plaintif menuntut RM22,000,000 sebagai gantirugi am. Amaun ini adalah keterlaluan dan melampaui. Selepas mengambil kira faktor-faktor yang relevan, Mahkamah berpendapat bahawa jumlah RM1,000,0000 sebagai gantirugi am adalah berpatutan dalam keadaan kes ini (lihat perenggan 53).]

Notes

For a case on contractual relationship between banker and cuatomer, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1816.

For a case on defamation in banks and banking business, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1925.

For cases on cheques generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2028–2047.

For cases on current account, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1920–1924.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 314–434

Cases referred to

Great One Coconut Products Industries (M) Sdn Bhd v Malayan Banking Bhd [1985] 2 MLJ 469 (refd)

Heppenstall v Jackson & Barclays Bank Ltd [1939] All ER 10 (refd)

Kpohraror v Woolwich Building Society [1996] 4 All ER 119 (refd)

Ng Cheng Kiat v Overseas Union Bank [1984] 2 MLJ 140 (refd)
Pang Fee Yoon v Piong Ken Siong & Ors [1999] 3 MLJ 189 (refd)
Ratcliffe v Evan [1892] 2 QB 524 (refd)
Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors [1999] 3 MLJ 529 (refd)
Tan Sri Dato' Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors [1995] 1 MLJ 39 (refd)
William Henry Rogers & Ors v William Whiteley (1892) 118 AC (refd)

Legislation referred to

Evidence Act 1950 ss 59, 60,101, 106
Rules of the High Court 1980 O 18 r 19
Subordinate courts Rules 1980 O 33 r 1, O 48 r 25

CK Wong (Kong Choong Keng & Co) for the plaintiff.
Wong Hok Mun and Arham Rahimi (Azim, Tunku Farik & Wong) for the defendant.

Ramly Ali J:

THE PARTIES

[1] The first plaintiff is a company having its registered office at Lot 2398, Jalan Connaught Bridge, 41300 Klang, Selangor. The second plaintiff is the Managing Director of the first plaintiff. The third plaintiff is the Deputy Managing Director of the first plaintiff. Initially, the second and third plaintiffs were parties to the present suit. However, they have been struck off as parties and the plaintiff company (first plaintiff) is now the sole plaintiff.

[2] The defendant, at material times, is a licensed bank with a branch office at No 1, Lorong Batu Tiga, 41300 Klang, Selangor.

[3] At all material times, the first plaintiff was a customer of the defendant operating the following accounts:

(a) one current Account No 1206–7074603–01–0 including an autopay system to pay salaries for its staff, employees and directors;

(b) one term loan facility account No: 1206–0000556–95–0;

(c) 11 fixed deposit accounts Nos

1206-0275306-68-2; 1206-0275471-68-8;

1206-0275377-68-3; 1206-0275376-68-0;

1206-0275472-68-0; 1206-0275473-68-3;

1206-0275307-68-5; 1206-0275295-68-8;

1206-0275375-68-8; 1206-0275308-68-8; A
and 1206-0271108-68-0.

PLAINTIFF'S CAUSES OF ACTION

[4] The plaintiff's cause of action centers on two garnishee orders to show cause B
both dated 5 July 1999 respectively by Apex Robot System (M) Sdn Bhd under Kuala Lumpur magistrate court summon No 72-15354-96 and Cheso Machinery Sdn Bhd under Kuala Lumpur magistrate court summons No 72-15355-96 as judgment creditors and the defendant as garnishee.

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[5] The defendant had received both the garnishee orders to show cause on 15 October 1999 at 11.30 am and thereafter the defendant had frozen all the plaintiff's accounts from 15 October 1996 to 22 October 1999 for eight days (or 7 banking days) without informing the plaintiffs by written notice nor verbally, nor by telephone, nor by facsimile nor by any other means. The plaintiff only came D
to know about the frozen account when, on 18 October 1999 (at 10.00 am) one of its employees had phoned the plaintiff complaining that two cheques issued by the plaintiff for payment were rejected by the defendant upon presentation

[6] On 15 October 1999, at 14.30 pm after the plaintiff's current account had E
been frozen by the defendant, there was a sum of RM98,888.06 directly paid into the already frozen current account of the plaintiff from USA by telegraph transfer. This sum of RM98,888.06 was never been allowed to be utilised by the plaintiff eventhough it was deposited after the plaintiff's current account had been frozen. This sum of money was never put into another separate account or temporary separate account by the defendant. F

[7] At the material time from 15 October 1999 to 22 October 1999 the total sum frozen by the defendant was RM443,619.54 (including the aforesaid sum of RM98,888.06). If added together with the fixed deposit account sum of RM211,469.17, the total sum is RM655,088.66.

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[8] During the same period (15 October 1999 to 22 October 1999), out of the cheques issued by the plaintiff and paid in by the relevant parties for payment, there were 12 cheques which had been dishonoured by the defendant and the words 'FROZEN ACCOUNT' printed and two cheques printed with the words 'REFER TO DRAWER'. H

[9] Among the 14 cheques dishonoured by the defendant, there were 2 cheques (cheque No 292692 and 292693) issued to the EPF for the amount of RM15,734.00 and Perkeso (cheque No 292747) for the amount of RM890.50. The plaintiff had been imposed penalty by the EPF due to the dishonoured 2 cheques. I

[10] The autopay system for the payment of the half-monthly salaries and wages to 153 employees of the plaintiff for the amount of RM7,449.50 was not allowed to be debited from the current account of the plaintiff until 20 October 1999.

PLAINTIFF'S CLAIM

[11] From the statement of claim, the plaintiff's claims are based on three allegations of facts, namely:

(a) the defendant had wrongly froze the plaintiff's account from 15 October 1999 to 22 October 1999 (first allegation);

(b) the defendant had wrongly dishonoured the cheques presented for payment from 15 October1999 to 22 October 1999 (second allegation); and

(c) the defendant had wrongly and/or maliciously printed the word 'Frozen Account' on the said cheques (third allegation).

In respect of the first and second allegations, these causes of action are in contract whereas the third allegation is premised on defamation.

[12] The plaintiff pray for the followings —

(a) Special Damages — RM 1,495,318.79;

(b) General Damages — RM22,000,000;

(c) Aggravated Damages — RM 5,000,000;

(d) Exemplary Damages — RM 5,000,000;

(e) Interest; and

(f) Costs.

ISSUE OF LIABILITY

[13] The court shall show deal with the issue of liability first.

[14] In respect of liability, the plaintiff's counsel submitted as follows:

(i) the defendant froze all the plaintiff's accounts maintained with the defendant;

(ii) the plaintiff accounts were frozen for seven banking days;

(iii) the defendant froze more than the amount due to the judgment creditor because:

(a) the principal sum and interest payable to the judgment creditors were ascertainable;

(b) the maximum amount which should be frozen should not exceed RM50,000 (ie RM25,000 x 2); and

(c) the defendant subsequently froze only RM40,000 vide its letter dated 22 October 1999;

(iv) the defendant froze monies which were credited into the plaintiff's said account which were deposited after service of the said garnishment orders;

(v) the defendant never informed the plaintiff immediately about the freezing of the account(s); and

(vi) the plaintiff wrongly dishonoured 14 cheques including two cheques issued to the Employees" Provident Fund and one cheque issued to Perkeso.

[15] In the evidence given by PW1, PW2 and PW3, it was all shown clearly that the defendant had at all material times during 15 October 1999 to 22 October 1999 never informed or notified the plaintiff that the plaintiff could use or operate the funds in the fixed deposit account even after the plaintiff had repeatedly made requests to the defendant. In such situation, it could be said that the defendant had given the plaintiff a very clear notice impliedly that the plaintiff's funds in other accounts with the defendant were also frozen and could not be used by the plaintiff as well. The defendant had not clearly informed the plaintiff that only their current account had been frozen.

[16] On the balance of probabilities, the court is convinced that the defendant had frozen all accounts of the plaintiff with the defendant. The plaintiff was completely deprived of the right and the benefit to use the funds in all the accounts with the defendant as the defendant had never advised, informed and notified the plaintiff to use the other funds (besides the current account).

[17] In exh P2 (as well as exh D24), it is clearly shown that interest was imposed and deducted during the frozen period from 15 October 1999 to 22 October 1999 on the term loan account of the plaintiff. It is shown as well at exh P3 about interests on all the fixed deposits, that ought to be provided to the plaintiff. In the defendant's statement of defence and the defendant's application under O 18 r 19 of the Rules of the High Court 1980 (which had been dismissed by this court), the defendant had repeatedly stressed that they were entitled to freeze all the accounts of the plaintiff with them, a fact which they could not have denied at this stage.

[18] The main issue to be determined here is what is the extent of the defendant's obligation (as a garnishee) under the said garnishee orders. Is it the defendant's obligation to attach 'any debt due or accruing due to the judgment debtor (plaintiff) from the garnishee (defendant) eventhough the amount of the judgment debt is less than the balance standing to the plaintiff's credit in the accounts, or does the garnishee order only confined to the amount *'so much thereof as is sufficient to satisfy the judgment debt or others and the costs of the garnishee proceedings'*. In order to do that, the court has to see the wordings and effect of the said garnishee orders whether they are of 'unlimited' nature or 'limited' nature.

[19] In an 'unlimited' garnishee order, the wordings of the order clearly indicate that the garnishee is to attach 'all debts owing or accruing' from the garnishee (the defendant) to the customer to answer the judgment debt, eventhough it is known that the amount of the judgment debt is less than the balance standing to the

customer's credit. In such a situation, the Bank (defendant) may and should refuse to pay any cheques drawn by the customer (see *The Law and Practice of Banking, Vol 1 Banker and Customer* (4th Ed) by J Milnes Holden, para 3.49, p 108).

[20] It was held by the House of Lords in *William Henry Rogers & Ors v William Whiteley* (1892) 118 AC that when served with an 'unlimited' garnishee order nisi a bank may and should refuse to pay any cheque by a customer, eventhough the amount of the judgment debt is less than the balance standing to the customer's credit. In that case, the House of Lords referred to the wordings and effect of the garnishee order in order to determine whether the order was an 'unlimited' order or "limited" one. In that case the creditor obtained a garnishee order which ordered that *'all debts owing or accruing'* from the bank to the customer be attached to answer the judgment debt. The court held that such an order is 'unlimited' in nature.

[21] The other type of garnishee order is a "limited' garnishee order when the effect is to attach only the amount of the judgment debt plus all other related costs and expenses as ascertainable and stated in the order. The practice is for the garnishee order of this nature to attach debts up to a stated sum only, in which case the bank is free to part with any surplus he may hold on the customers' account.

(1) *The Law and Practice of Banking Vol 1: Banker and Customer* (4th Ed), J Milnes Holden, para 3.52, p109;

(2) *Judicial Decisions Affecting Bankers and Financiers* by Dato' Syed Ahmad Idid bin Syed Abdullah Idid (Editorial Note - LDB Vol 1, p 182;

(3) *Paget's Law of Banking* (11th Ed) Mark Hapgood QC of Grey's Inn.

[22] If a banker is served with a 'limited' garnishee order and if the amount attached is less than the customer's credit balance to practice is to transfer from the customer's account to a suspense account a sum sufficient to satisfy the judgment debt and all other related costs and expenses as stipulated in the order. The balance remaining on the customer's account is at his disposal and the relationship of banker and customer will continue. The customer should be notified that a stated sum has been debited to his account in compliance with the terms of the garnishee order (see *The Law and Practice of Banking Vol 1: Banker and Customer*, (4th Ed) J Milnes Holden, para 3.52 p 109).

[23] In *Law of Dishonour of Cheques* (2nd Ed) 1999 AN Sana, the learned author states that:

> As a result of a garnishee order the banker is stopped either absolute or partially from carrying out his obligation to honour his client's cheques. When the banker is informed of the amount required for the satisfaction of the decree in connection with which the order issued, he can honour cheques as long as he can do so without touching the amount required for meeting the decree…. transferred to a suspense account and the customer can be allowed to operate on the balance.

[24] In the present case, in both the garnishee orders, the salient wordings or terms are as follows:

… bahawa segala hutang yang kena dibayar atau terakru kena dibayar oleh garnisi yang tersebut di atas kepada penghutang penghakiman yang tersebut di atas dalam jumlah wang sebanyak RM8,800.00 dan faedah sebanyak RM1,847.76 hingga 4 haribulan November 1998 dan faedah 8% setahun bermula dari 4 haribulan November 1998 hingga penyelesaian sepenuhnya dan kos sebanyak RM319.00 ditahan sebagai menjawab penghakiman……

… bahawa segala hutang yang kena dibayar atau terakru kena dibayar oleh Garnisi yang tersebut di atas kepada Penghutang Penghakiman yang tersebut di atas dalam jumlah wang sebanyak RM8,800 dan faedah sebanyak RM1,270.15 hingga 4 haribulan November 1998 dan faedah 8% setahun bermula dari 4 haribulan November 1998 hingga penyelesaian sepenuhnya dan kos sebanyak RM319.00 ditahan sebagai menjawab penghakiman…

[25] The court is satisfied that both the garnishee orders in the present case from their respective wordings and terms are "limited" in nature with the principal debts, interests and costs had been clearly specified and spelt out in the orders. The sums as stated in the orders can easily be ascertained and determined.

[26] Both the garnishee orders were issued by the Kuala Lumpur magistrate court under O 33 of the Subordinate Courts Rules 1980*to satisfy the judgment debt or other and the costs of the garnishee proceedings.* Order 48 rule 25 of the Subordinate Court Rules 1980 has stated very clearly the costs that the judgment creditor is entitled under the law. All these costs are easily ascertainable and determined.

[27] Order 48 r 25 of the Subordinate court Rules 1980 provides:

25 Where upon the application of any person who has obtained a judgment or order against a debtor for the recovery or payment of money a garnishee order is made under O 33 r 1 against a garnishee attaching debts owing or accruing from his to the debtor the following costs shall be allowed:

(a) to the garnishee, to be deducted by him from any debt owing by him as aforesaid before payments to the applicant:

Where no affidavit is used: RM25.00

Where affidavit is used: RM40.00

(b) to the applicant, to be retained, unless the court otherwise orders, out of the money recovered by him under the garnishee order and in priority to the amount of the debt owing to him under the judgment or order where the amount recovered by the applicant from the garnishee is:

Not more than RM100 — RM10.00

Not more than RM100: RM40.00

More than RM100: RM40.00

Where the garnishee fails to attend the hearing of the application and an affidavit of service is required: RM10.00

[28] In the defendant's letter dated 22 October 1999 to the plaintiff, the defendant notified that the defendant had attached a sum of RM40,000.00 to satisfy both garnishee orders and informed the plaintiff that they were allowed to operate the

balance or surplus sum in the plaintiffs' accounts with the defendants. This letter of the defendant is a clear evidence that all the sum stipulated in the garnishee orders can be ascertained and determined. Unfortunately, the said letter came too late, after the damage had been done and the plaintiff had been deprived of the facilities for eight days, (since 15 October 1999). In the present case, there are evidence to show that the plaintiff had no other account with other banks except the one with defendant (the subject matter of the present suit). At the material time from 15 October 1999 to 22 October 1999, the total sum frozen by the defendant was RM443,019.54 (including the aforesaid sum of RM98,888.06 banked in after the defendant was served with the garnishee orders). If added together with the fixed deposit account sum of RM211,469.12, the total sum was RM655,088.66. All these sums were frozen by the defendant (from 15 October 1999 to 22 October 1999) just to satisfy the judgment debts of RM40,000.00 under the garnishee orders. The court is satisfied that the defendant had failed in its duty to act promptly as a banker to the plaintiff, as its customer.

[29] As a prudent banker, the defendant should have notified the plaintiff immediately of the matter upon service of the garnishee orders on 15 October 1999 and not to wait until 22 October 1999. The plaintiff should be informed that, if he wishes to do so, he may open a new account for future transaction. Alternatively, the defendant should have set aside the total amount required to satisfy the garnishee orders in full into a suspense account and allow the plaintiff to continue operate the existing accounts. Both have not been done by the defendant in this case. In this respect, the court is in full agreement with J Milnes Holden in his book *The Law and Practice of Banking Vol 1: Banker and Customer* (4th Ed), para 3–50, pp 108–109 where he states:

> 3-50 The customer should be notified of the situation immediately, and he should be informed that, if he wishes to do so, he may open a new account for future transaction. The bank may even be prepared in some cases to permit this new account to become overdrawn, especially in those cases where the balance on the original account exceeds the amount of the garnishee order together with the costs which are likely to be incurred in the garnishee proceedings. Any credit balance on the new account would not be attached by the existing garnishee order.

[30] After the plaintiff's current account had been frozen by the defendant, there was a sum of RM98,888.06 directly paid into the already frozen current account of the plaintiff from USA by telegraphic transfer. This sum of RM98,888.06 was never allowed to be utilised by the plaintiff eventhough it was deposited after the plaintiff's current account had been frozen by the defendant. This sum of money was never put into another separate account or temporary separate account by the defendant.

[31] In *Heppenstall v Jackson and Barclays Bank Ltd* [1939] All ER 10, the court of Appeal (UK) held that 'the garnishee order only affected debts in existence at the date of the service thereof and the moneys subsequently paid in could not be subjected to the order.'

[32] Further, in the same case, Scott LJ in delivering the decision had stated that: **A**

> All those decisions make it quite clear that a garnishee order attaches no debts which do not exist at the moment when the order is made and served, and, further than that, the applicant for a garnishee order is required both by the Supreme court Rules and by the County court Rules to swear an affidavit as to the amount of the debt alleged to be owing then to the judgment debtor and the jurisdiction to make the order is limited to debts so proved by affidavit. The cases begin with the decision in 1858 in *Jones v Thompson (1),* where it was clearly laid down by a court consisting of Wightman and Crompton JJ, that the word 'or accruing' were limited to the substantive noun 'debt', and that, in order to satisfy those words, there had to be a debt in existence, although it might be a debt which was not payable till a subsequent date — debitum in proesenti solvendum in futuro. The same interpretation was followed in *Trapp v Jones (2)* and again in *Webb v Stenton (3)*, where Lord Esher MR expressed the decision of the court in absolutely unambiguous language at p 523… **B** **C**

[33] In *Law of Banker and Customer* (4th Ed) Poh Chu Chai, p 386, the learned author agrees that 'a garnishee order affects a debt due or accruing due to a judgment debtor at the date of the order; funds which become payable to a judgment debtor after the date of the garnishee order are generally not affected by the order.' **D**

[34] In the present case, the defendant had wrongly frozen the said amount of RM98,888.06 which was paid in after the garnishee orders were served on the defendant and the current account of the plaintiff frozen by the defendant. The said amount is not subject to the garnishee orders and should be paid into a new temporary account so that the plaintiff has the benefit to utilise the amount. This was also not done by the defendant. **E**

F

[35] During the frozen period from 15 October 1999 to 22 October 1999, 12 cheques had been dishonoured by the defendant and printed with the word 'FROZEN ACCOUNT' and two cheques had been printed with the words 'REFER TO DRAWER'. Contrary to the submission made by the defendant, the words 'FROZEN ACCOUNT' is highly defamatory, in its original meaning. It only suggests that the plaintiff must have been wound up or liquidated. It is more severe than the words 'account closed'. The defendant had published these defamatory words to the holder of the cheques, the banks which were clearing the cheques. **G**

[36] In *Ng Cheng Kiat v Overseas Union Bank* [1984] 2 MLJ 140, Wan Hamzah J held: **H**

> One question to be considered in this case is whether the words 'Account Closed' were defamatory. In Wilson v Midland Bank the customer's cheque was wrongfully dishonoured by the bank with the answer 'no account'. The court awarded the customer nominal damages for breach of contract and substantial damages for libel. Therefore in my opinion the words 'Account Closed' written on a cheque contrary to the truth would similarly be libellous. As I have indicated, no blame can be attached to the Bank for printing the words 'Account Closed' on the cheque No 488534. As regards the cheque No 488535, in my judgment it was libellous for the Bank to print the words 'Account Closed' on it at the time when the Bank had the duty to honour it. **I**

[37] It is a question of law for the court to decide whether the natural and ordinary meanings of the words used in the articles are capable of conveying a defamatory meaning of and concerning the plaintiff. Libel does not depend on the intention of the defamer but on the fact of defamation and it is irrelevant to consider the meaning for the writer and publisher intended to convey. The question is to be determined by an objective test (see *Tan Sri Dato' Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors* [1995] 1 MLJ 39 and *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529).

[38] In the present case, it has been shown that the defendant had wrongly frozen the plaintiff's accounts. All the cheques presented for payment were dishonoured and stamped with the words 'FROZEN ACCOUNT' and 'REFER TO DRAWER'. These words (particularly the words 'FROZEN ACCOUNT') are highly defamatory, as it suggests that the plaintiff must have been wound-up or liquidated. The law presumes that defamatory words are false with the burden of establishing the truth of the statement falling squarely on the defendant.

Procedurally, the defendant should have attempted to prove the truth of those words, after the plaintiff had adduced the defamatory effect of the words. How to carry out this difficult task will depend on the type of action undertaken by the defendant. It may be resolved at the plaintiff's stage by a tactically successful cross-examination or by the production of cogent evidence at the defence stage (see *Pang Fee Yoon v Piong Ken Siong & Ors* [1999] 3 MLJ 189).

[39] The defendant in the present case had completely failed to give any defence on this issue of defamation. This can be seen in the statement of defence and testimonies tendered by the witnesses of the defendant. The truth of those words 'FROZEN ACCOUNT' were never proved by the defendant.

[40] On the above considerations, the court is satisfied, on the balance of probabilities that:

(a) the defendant had wrongly froze the plaintiff's accounts from 15 October 1999 to 22 October 1999;

(b) the defendant had wrongly dishonoured the cheques presented for payment from 15 October 1999 to 22 October 1999; and

(c) the defendant had wrongly and/or maliciously printed the defamatory words 'FROZEN ACCOUNTS' and 'REFER TO DRAWER' on the said cheques.

Issue of Damages

[41] The plaintiff is claiming for the following:

(a) Special Damages: RM1,4495,318.79;

(b) General Damages: RM22,000,000;

(c) Aggravated Damages: RM5,000,000;

(d) Exemplary Damages: RM5,000,000;

(e) Costs;

(f) Interest.

[42] The plaintiff's evidence which was not seriously challenged by the defendant, show that, as a result of the defendant's action in wrongly freezing the plaintiff's accounts during the relevant period (15 October 1999 to 22 October 1999), the plaintiff has suffered the following:

(a) The cheques issued by the plaintiff to various persons where dishonoured upon presentation for payment;

(b) Employees and operations were not in working condition. They worried that the plaintiff would be wound up and their future with the plaintiff uncertain;

(c) Suppliers and customers called to find out whether the plaintiff has been wound up;

(d) Plaintiff stopped issuing further cheques for payment. For those which had been issued, plaintiff had to call suppliers not to bank in first; some were replaced by director's personal cheques". Some creditors and suppliers were very angry and had lost confidence in the plaintiff's financial standing;

(e) All the cheque holders came to complain once they realised that their cheques could not be honoured;

(f) Customers and suppliers lost confidence in the plaintiff. It took quite a long time to convince some of them to continue trade with the plaintiff;

(g) Workers and employees were not able to get their pay (on 17th of each month) as the autopay facility for wages of workers and employees had also been frozen by the defendant;

(h) Some workers and employees left the plaintiff; and

(i) Some of the dishonoured cheques were for the purpose of employees contributions to the EPF. The plaintiff was charged penalty of RM198 for failure to pay EPF contributions for its employees on time.

[43] The court finds guidance on this issue in the case of *Ng Cheng Kiat v Overseas Union Bank* [1984] 2 MLJ 140 where Wan Hamzah J held as follows:

> Where a customer brings an action against his bank for wrongfully refusing to pay a cheque which he has drawn, the amount of the damages for breach of contract depends on whether or not the customer is a trader. In an action for breach of contract for wrongfully dishonouring a trader's cheque, the plaintiff is entitled to recover substantial but reasonable damages for injury to his commercial credit, without the necessity of alleging and proving any actual damage."

[44] In another case, *Great One Coconut Products Industries (M) Sdn Bhd v Malayan Bankiing Bhd.* (1985) 2 MLJ 469, Zakana Yatim J, held as follows —

> I shall now deal with the quantum of damages to be awarded to the plaintiff.... The plaintiff, however, is still entitled to claim substantial damages, but the damages must

be reasonable. See JM Holden, *The Law and Practice of Banking* (2nd Ed) Vol 1 p 84. The amount asked for by the plaintiff is far too exorbitant. The question is what are the factors to be taken into consideration in order to award substantial but reasonable damages in favour of the plaintiff in the present case. In my opinion, the factors to be taken into consideration are as follows: First, the position and standing of the trade of the honouring the five bank drafts; and fourthly, whether there was an injury to the credit of the plaintiff as a trader.

[44] *Paget's Law of Banking* (9th Ed) at p 240 also states:

> Every authority from *Foley v. Hill* (1848) Z HL Cas. 28) to *Joachimson v. Swiss Bank Corpn* (1921) 3 KB 110, 26 Com Cas. 196) and the Bill of Exchange Act alike recognize that the Banker's primary function and duty is to honour his customer's cheques, provided the state of the account warrants his doing so and there is no legal reason or excuse to the contrary. Apart from this contractual obligation, or as a consequence thereof, the pay in banker must remember that his customer's credit is or may be seriously injured by the return of one of his cheques dishonoured, and the smaller the cheque, the greater the possible damage to credit (*Marzetti v Williams* (1830) 1 B & Ad 415).

[45] The credit rating of the plaintiff (who is actively engaged in trade) is as important for their trade transactions including mortgages and hire-purchase as well as banking and credit facilities. The refusal to meet the plaintiffs cheques is so obviously injurious to the plaintiffs credit and that the plaintiff should recover, substantial, but reasonable compensation for the injury done too its credit. (see: *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119).

[46] By printing the words 'FROZEN ACCOUNT' and 'REFER TO DRAWER', it is actually highly libellous, and tantamount to mean that the plaintiff had been wound up or had gone into liquidation. It is actually worse than all the events happened in *Ng Cheng Kiat v. Overseas Union Bank* [1984] 2 MLJ 140 or *Great One Coconut Products Industries (M) Sdn Bhd v Malayan Banking Bhd.* [1985] 2 MLJ 469 or *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119. The damage is of upmost disastrous, and serious to the plaintiff as a company and a trader in the present business, commercial and industrial world as news had been wide spread fast with the most advance telecommunication system available for example the mobile phone. Also the plaintiff is situated in Klang, Selangor Darul Ehsan and it is smaller in town area as compared with city like Kuala Lumpur. Hence, news would be wide spread.

[47] As had been decided in the above quoted cases, damages should be awarded to the plaintiff by the defendant for wrongfully dishonoured the cheques of the plaintiff drawn upon the defendant where there was more than sufficient funds in the plaintiff's accounts. The damages should be substantial and not nominal and the plaintiff need not even plead or prove damages. The defendant was not in breach of the contract for wrongfully dishonoured the plaintiff's cheque for once but repeatedly for 14 times.

[48] The general rule is that damages are to be assessed on a compensatory basis ie to compensate the plaintiff for the harm caused to him by those libelous words.

The compensation may be inflated by certain aggravating factors such as the defendant's nature, conduct, malice etc; trade operation of the plaintiff, customers' and suppliers' estimation of the plaintiff's credit integrity; and the locality where the plaintiff operates its business.

[49] As for special damages, the plaintiff is claiming for a sum of RM1,495,318.79. As pleaded by the plaintiff at para 39 of the statement of claim as well as testimonies of PW1, PW2 and PW3, the court is satisfied that the plaintiff has clearly been either deprived of or suffered loss as the consequence of the frozen period from 15 October 1999 to 22 October 1999. On the balance of probabilities the plaintiff had actually discharged the burden under ss 101 and 106 of the Evidence Act 1950; and the defendant had failed to rebut the testimonies of PW1, PW2, and PW3 during cross-examination or through its own witnesses. Therefore, a sum of RM1,495,318.79 is allowed for special damages as claimed.

[50] As for general damages, the court is also satisfied, on the balance of probabilities, that the witnesses of the plaintiff (PW1, PW2 and PW3) had duly testified in court and the same had not been challenged and/or rebutted by the defendant during cross- examination. By virtue of s 59 and 60 of the Evidence Act 1950, the plaintiff had proven all facts by evidence given by PW1, PW2 and PW3, on the balance of probabilities.

[51] It is trite that in cases of libel and slander actionable per se, the plaintiff need not prove actual damages for as was said by Bowen LJ in *Ratcliffe v Evan* (1892) 2 QB 524 at p 528**:** 'The Law presumes that some damages will flow in the ordinary course of things from the mere invasion of his absolute right to reputation'.

[52] Even though the plaintiff is entitled to claim substantial damages from the defendant, the court must stress that the damages must be reasonable. In the present case, the plaintiff is asking for RM22,000,000 as general damages. This amount is far too exorbitant and excessive. After taking into consideration all the relevant factors, the court is of the view that a sum of RM1,000,0000 as general damages is reasonable under the circumstances of the present case.

[53] As pleaded, the plaintiff is also claiming for exemplary damages for a sum of RM500,000. The defendant is a well-established bank in Malaysia. The defendant's primary function and duty is to honour its customer's cheque, provided the state of the account warrants his dong so and there is no legal reason or excuse to the contrary. Apart from his contractual obligation or as a consequence thereof, the defendant must remember that its customer's credit is or may be seriously injured by the return of his cheques dishonoured.

[54] In the present case, the defendant has failed to notify the plaintiff of the garnishee orders and its action to freeze the plaintiff accounts, immediately after being served with the orders on 15 October 1999. Despite legal advice from its Legal Department, the defendant proceeded to freeze all the plaintiff's account, including a sum which was paid after the account was frozen. The defendant had taken too long (ie eight days) to inform the plaintiff about the matter. Only on 22 October 1999,

the defendant wrote to the plaintiff about the matter and to allow the plaintiff to operate its account after a sum of RM40,000 was set aside to answer the said garnishee orders. The defendant has failed to take immediate action in order to avoid the plaintiff from being deprived of the facilities. The defendant has also failed to apologise to the plaintiff for all 'wrongs' it has done to the plaintiff. The defendant's unprofessional conduct in the matter tantamounts to a clear disregard of customer's interest in the banking industry.

[55] That being the case, the court feels that exemplary damages as prayed by the plaintiff must be allowed. Thus, the court allowes a sum of RM500,000 as exemplary damages to be paid by the defendant to the plaintiff.

CONCLUSION

[56] Based on the above considerations, the court allows the plaintiff's claim against the defendant as follows —

(a) Special damages — RM1,495,318.79;

(b) General damages — RM1,000,000;

(c) Exemplary damages — RM 500,000;

(d) Interest (as per statement of claim);

(e) Costs.

Order accordingly.

Reported by Sally Kee